

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

MICHAEL MOATES,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

Case No. 4:20-CV-00896-ALM-KPJ

**DEFENDANT FACEBOOK INC.'S
RESPONSE TO PLAINTIFF'S MOTION FOR LEAVE TO WAIVE
DISCOVERY CONFERENCE OR ORDER REQUIRING CONFERENCE**

Plaintiff's motion reflects a lack of understanding of Rule 26, the applicable local rules, and the current procedural posture of this case. First, until a scheduling conference is set by the Court, there is no need to meet and confer on a discovery plan and schedule. And second, unless the Court rejects Judge Johnson's Report and Recommendation, this case will soon no longer be pending in this district, mooted any discovery or scheduling issues. In sum, this Court should deny Plaintiff's motion and allow the report and recommendation process to be completed.

I. Under Rule 26 and the Court's Customary Practice, Meeting and Confering on Discovery Would be Premature.

The purpose of a Rule 26(f) conference is to develop a proposed discovery plan and scheduling order that will govern preparation of the case for trial. Rule 26(f)(1) sets only a relative deadline by which the parties must confer. See FED. R. CIV. P. 26(f)(1) ("as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b)."). Thus, no precise deadline exists until the Court sets a scheduling conference. In this court, that order is typically titled "Order Governing Proceedings" and usually

sets an exact date and time for a Rule 16 scheduling conference as well as exact deadlines for the 26(f) conference to occur and a joint report regarding the results of the 26(f) conference to be filed. Plaintiff's quote from Local Rule CV-26 that a party is not excused from responding to discovery because motions are pending is not applicable here. Facebook is not refusing to respond to discovery; none has been served and no initial disclosure deadline has been set. The proper order of proceedings begins with the Court setting a scheduling conference and until that occurs or the Court requires otherwise, there is no obligation to meet and confer on a discovery plan and schedule, much less respond to discovery that does not exist.

II. No Order Governing Proceedings has Issued and None is Necessary.

Here, the Court has elected to hear several preliminary motions (Plaintiff's request for injunctive relief and Facebook's motion to dismiss and motion to transfer) prior to issuing an Order Governing Proceedings. On May 14, 2021, Judge Johnson issued a Report and Recommendation recommending that this case be transferred to the Northern District of California. See Dkt. #42. Plaintiff objected to the Report and Recommendations on May 28, 2021, and Facebook's response to these objections is due June 11, 2021. Judge Mazzant will then decide whether to adopt the report. If the report is adopted, the case will be transferred and there will be no need for this Court to conduct a scheduling conference, set the case for trial, or determine the bounds of a reasonable discovery plan. Under these circumstances, requiring the parties to meet and confer about a discovery plan and schedule is at least premature, if not wholly unnecessary. If, however, Judge Johnson's recommendation is rejected and Facebook's motion to transfer is denied, Facebook intends to request that the Court defer discovery until the Court addresses Facebook's pending Motion to Dismiss.

WHEREFORE, Facebook prays that Plaintiff's Motion for Leave to Waive Discovery Conference or Order Requiring Conference be denied.

Dated: June 11, 2021

Respectfully submitted,

/s/ E. Glenn Thames, Jr.

E. Glenn Thames, Jr.
Texas Bar Number 00785097
glennthames@potterminton.com
POTTER MINTON
A Professional Corporation
110 N. College Avenue, Suite 500
Tyler, TX 75702
Telephone: 903 597-8311
Facsimile: 903 593-0846

KEKER, VAN NEST & PETERS LLP
Christopher C. Kearney - # 154101
ckearney@keker.com
W. Hamilton Jordan - # 295004
wjordan@keker.com
633 Battery Street
San Francisco, CA 94111-1809
Telephone: 415 391 5400
Facsimile: 415 397 7188

ATTORNEYS FOR DEFENDANT
FACEBOOK, INC.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with this document via the Court's CM/ECF system pursuant to Local Rule CV-5. Service outside the court's electronic-filing system has been completed on June 11, 2021, per the Plaintiff's consent to electronic service, as follows:

Michael Moates at the following email addresses:

michael.moates@thenarrativetimes.org

michaelsmoates@gmail.com

/s/ E. Glenn Thames, Jr.

E. Glenn Thames, Jr.